Supreme Court, U.S.
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No. 02-1838

IN THE

Supreme Court of the United States

FRANKLIN JAY SCOTT, JR. and NICHOLAS THOMAS,

Petitioners,

v.

SCHOOL BOARD OF ALACHUA COUNTY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether the United States Court of Appeals for the Eleventh Circuit properly affirmed the district court's judgment in favor of the School Board upon finding that Santa Fe High School's ban on the display of Confederate battle flags on school grounds was not an unconstitutional restriction of its students' First Amendment rights.

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Rule:

United States Supreme Court Rule 10 14

STATEMENT OF THE CASE

In setting forth a statement of the case which ignores all unfavorable facts, the students appear to misconstrue well-established law that a court must view the facts and draw all reasonable inferences deducible from those facts in favor of the party against whom a summary judgment is sought *considering all the evidence presented*. Undisputed facts, however unfavorable, cannot be merely ignored.[1]

The record contains uncontradicted evidence that clearly establishes that the intent of the Santa Fe High School administration in enacting the ban on Confederate battle flags was not to restrict the students' ostensible political message, but, rather, was intended to preserve the educational environment on its campus and prevent substantial disruption of school activities.

The record shows that in the spring of 1999, a dean at Santa Fe High School, Loretta Shane, was contacted by school transportation officials to handle a series of racially

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1. *See, e.g.*, *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 151 (2000) (holding that in reviewing *all the evidence on a motion for summary judgment* a court "should give credence to the evidence favoring the nonmoving party as well as the evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that that evidence comes from disinterested witnesses" *as well as* contemplating that some evidence provided by the interested party may be considered on summary judgment) (emphasis added) (internal quotation omitted); *Chesapeake & Ohio R.R. v. Martin*, 283 U.S. 209, 216 (1931) (holding that even the testimony of the moving party that "is not contradicted by direct evidence, nor by any legitimate inferences from the evidence, and . . . is not opposed to the probabilities, nor, in its nature, surprising or suspicious, [need not be] den[ied] conclusiveness").

charged incidents that occurred on the school's buses. The tense situation that had been brewing culminated in a major fight on one of the buses, precipitated in part by two students exchanging racial slurs, *i.e.* calling each other "cracker," "whitey," and "nigger."

After the bus arrived at school, the fight spilled over onto campus resulting in a very tense disturbance involving the gathering of hundreds of students. Later that day, Dean Swain observed a backlash among the student body. The black and white students seemed divided and the interaction between them was more limited than normal.

The next day students boarded the bus bearing Confederate battle flags on their backpacks. A concerned black student pointed out Confederate battle flags to the deans. Through discussions with the students, the administration learned that the white students were displaying the Confederate battle flags as a show of support for friends who had been disciplined as a result of the incident on the bus.

The display of the Confederate battle flags coupled with the racial epithets from the day before led the administration to be concerned that ill feelings between the students might continue to grow and escalate. As a result, that day and shortly thereafter, the administration confiscated backpacks embellished with Confederate battle flags. On one of those backpacks, a student wrote words to the effect, "I hate niggers" or "I'd like to kill a nigger."

The school bus incident resulted in a general racial unrest on campus. Dean Shane frequently heard from some black students that they believed that they were being sent to see

her by white teachers because the teachers were prejudiced. Dean Swain also heard from both white and black students that they were being treated unfairly because of their race or that the other race was receiving preferential treatment. The students' parents voiced similar concerns.

In Dean Shane's opinion, the situation was churning and starting to build. Similarly, Dean Swain recounted underlying racial pressure at Santa Fe High School which had the potential to incite or blow up into something much bigger.

Dean Shane confirmed her understanding that students may express themselves in a manner that does not disrupt the orderly process of the educational environment. Moreover, Dean Shane emphasized that she is concerned with the manner and where speech takes place and the disruption that occurs, not the content. Under those principles, Dean Shane believed that the ban on the display of Confederate battle flags on the Santa Fe High School campus was necessary to prevent disruptions and prevent any further escalation of the racial tension.

Similarly, Dean Swain also recognized that students had the right to express themselves so long as that expression did not disrupt the orderly process of education or infringe on the rights of others. In his opinion, the display of Confederate battle flags was disruptive to the educational process.

Dr. Lamar Simmons, the principal at Santa Fe High School, also testified that he believed that banning Confederate battle flags from the campus of Santa Fe High School was necessary to maintain discipline, order, and to preserve the educational environment.

Confederate battle flags were not the only insignia deemed disruptive and, therefore, prohibited on school campus. The Santa Fe High School administration also prohibited clothing that contained references to alcohol or illegal substances, sexual content (such as Hooters and Big Johnson t-shirts), violence, profanity, swastikas, and Malcolm X symbols.

In fact, the administrators tried to be as consistent as possible with all factions in relation to how they handled the dress code. They tried to make a blanket rule that fit all sides for the harmony of the school and to prevent disruption because of clothing worn by either black or white students. All students were made aware of what the administration considered disruptive through classroom discussions devoted to presenting the Code of Student Conduct and providing an opportunity to discuss its contents. The deans would also counsel a student who violated the policy on an individual basis to seek the student's future cooperation.

Nevertheless, on September 18, 2000, Petitioner Scott drove through the parking lot at Santa Fe High School with a five-foot by three-foot Confederate battle flag prominently displayed on a pole in the bed of his pick up truck. White students on a nearby school bus who observed the display stood up and began "hooting and hollering." In response to this incident, some of the black students on the bus expressed concern that there would be problems for the black students at school that day.

After Scott removed the flag from his truck, he was warned not to display the flag again by the administration. Shortly thereafter, Scott returned to school with a two-foot by two-foot Confederate battle flag flying from his antenna.

The next day, October 24, 2000, Scott once again displayed the flag on his antenna as he drove onto the Santa Fe High School campus.

Santa Fe High School administrators suspended Scott for two days. This incident was Scott's fourth disciplinary referral in five weeks while attending Santa Fe High School. As a result of Scott's continued misbehavior, his zoning exception was revoked and he was required to attend his originally assigned school. Pursuant to an agreement between counsel, Scott returned to Santa Fe High School for his senior year.

In October of 2000, Thomas was disciplined for wearing a shirt on school campus that displayed several Confederate battle flags. The first time he was warned not to wear the shirt on school campus again; the second event resulted in a one-day suspension. Neither student sought administrative review of the disciplinary action.

REASONS FOR DENYING THE PETITION

Federal law is well-established that in the public school setting, students' protections under the First Amendment differ from the constitutional protections afforded in other contexts. *See, e.g., Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969). Students must exercise their limited right to freedom of expression "in light of the special characteristics of the school environment" and must do so without "materially and substantially interfering with the requirements of appropriate discipline in the operation of the school and without colliding with the rights of others." *Id.* at 506, 513 (citations omitted). Student behavior that "for any reason . . . materially disrupts

class work or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech." *Id.* (citation omitted).

In this case, the record clearly established a history of racial tension at Santa Fe High School that led the school administration to forecast that the display of the Confederate battle flag might lead to substantial disruption of or material interference with school activities. Notably, this case involves the decision made by administration at a single school out of the forty-five schools within Alachua County. It does not involve a district-wide ban of the Confederate battle flag, but, rather, the isolated decision of a single administration based on the unique history of racial tensions at that particular school.

In this case, in view of the discretionary nature of the educational process, the Eleventh Circuit properly recognized the judicial deference to be given to the judgment of school administrators who have firsthand knowledge of the environment at an individual school when it stated:

> Although public school students' First Amendment rights are not forfeited at the school door, those rights should not interfere with a school administrator's professional observation that certain expressions have led to, and therefore could lead to, an unhealthy and potentially unsafe learning environment for the children they serve. Short of a constitutional violation based on a school administrator's unsubstantiated infringement on a student's speech or other expressions, this Court will not interfere with the administration of a school.

Scott v. School Bd. of Alachua County, 324 F.3d 1246, 1249 (11th Cir. 2003); *see, e.g., Bethel School District v. Fraser*, 478 U.S. 675, 683, 685 (1986) (holding that "the determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board," and not with the federal courts) *accord Hazelwood School District v. Kuhlmeier*, 484 U.S. 260, 267 (1988); *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968) (holding that judicial interposition in the operation of the public school system raises problems requiring care and restraint).

Thus, the Eleventh Circuit properly concluded that the school's prohibition of the Confederate battle flag's display on school grounds did not violate the students' constitutional rights. Since the court properly applied well-established law to the underlying facts of this case, review is unwarranted, and this Court should deny the students' Petition for a Writ of Certiorari.

I. THE ELEVENTH CIRCUIT'S RULING DOES NOT RAISE THE QUESTION PRESENTED BY THE PETITIONERS.

The question presented by the students in their Petition is whether a public high school may "ban the non-disruptive display of the Confederate Battle flag." Likewise, the students assert that "the Eleventh Circuit has established a rule that public high school students do not enjoy a constitutional right to the non-disruptive display of Confederate Battle flags under the First Amendment" and suggest that the court upheld an "unsubstantiated ban." (Petition, pg 7, 9, 12). However, the students fail to cite any portion of the Eleventh Circuit's opinion in this matter that expressly states or impliedly

suggests such a broad holding. The reason for their failure to cite any portion of the opinion that actually supports that assertion is simple: neither the Eleventh Circuit nor the district court reached that conclusion.

To the contrary, the Eleventh Circuit held:

> the ban on the display of Confederate symbols was not unconstitutional. ***School officials presented evidence of racial tensions existing at the school and provided testimony regarding fights which appeared to be racially based in the months leading up to the actions underlying this case. Additionally, one only needs to consult the evening news to understand the concern school administrators had regarding the disruption, hurt feelings, emotional trauma and outright violence which the display of the symbols involved in this case could provoke.*** Therefore, under both *Tinker* and *Fraser*, the school administrators did nothing wrong in banning the display of Confederate flags on school property.

Scott at 1249 (adopting in part the order of the district judge below) (emphasis added).

Thus, after review of the briefs, the record, and relevant case law, the Eleventh Circuit properly applied a *Tinker* analysis in concluding that the Santa Fe High School administration did not violate the students' constitutional rights by banning the display of Confederate battle flags on school grounds. *Id.* at 1247-49. Moreover, the court also properly concluded that the administration reasonably restricted student speech under the alternative *Fraser*

standard. *Id.* The application of the law to the record facts in this matter was entirely appropriate and does not warrant review by this Court.

II. THE ELEVENTH CIRCUIT'S RULING DOES NOT CONFLICT WITH THE SIXTH CIRCUIT'S HOLDING IN *CASTORINA v. MADISON COUNTY SCHOOL BOARD* OR ANY OTHER CASE CITED BY THE PETITIONERS.

In *Castorina ex rel. Rewt v. Madison County School Board*, 246 F.3d 536, 544 (6th Cir. 2001), the Sixth Circuit emphasized the importance of the factual circumstances in school speech cases. In *Castorina*, the Sixth Circuit found that it was "unable to resolve the constitutionality of the school board's actions without knowing the manner in which the school board enforced its dress code and whether Madison County High School had actually experienced any racially based violence prior to the suspensions." *Id.* at 538. Moreover, the students claimed the high school failed to ban clothing bearing the "X" symbol associated with Malcolm X and the Black Muslim movement. *Id.* at 541. Thus, the school's refusal to prohibit this apparel along with the Confederate battle flag gave the appearance of a targeted ban. *Id.*

Accordingly, the Sixth Circuit reasoned that "without any formal factual findings to guide it," construing the facts in the light most favorable to the students, and "[a]ssuming that there ha[d] not been any racially motivated violence or threat in the Madison County schools," it could only conclude that the school had banned only certain racial viewpoints without any showing of disruption. *Id.* at 542. Thus, the court concluded that material questions of fact remained which

rendered that particular case inappropriate for summary judgment. *Id.*; *cf. Melton v. Young*, 465 F.2d 1332 (6th Cir. 1972), *cert. denied*, 411 U.S. 951 (1973) (discussed *infra*).

However, the court the noted that, upon remand, "if the students cannot establish their factual claims, then the principal and school board may have acted within their constitutional authority to control student activity and behavior." *Id.* at 544.

The *Castorina* court declined to apply the *Fraser* analysis to the facts of the case reasoning that the prohibition on the Confederate flag was an attempt to regulate the speech's content, rather than manner of the speech. *Id.* at 542. Moreover, the court noted that "a clear underpinning of the Court's holding in *Fraser* was the disruptive nature of the plaintiff's nominating speech and the fact that the sanctions were not based on one particular political viewpoint." *Id.*

Unlike *Castorina*, the record in this case demonstrates Confederate battle flags were not the only symbols deemed disruptive and, therefore, prohibited on school campus. The uncontradicted testimony of the Santa Fe High School administration demonstrates that they attempted to implement viewpoint neutral regulations for the harmony of the school and to prevent disruption because of clothing worn by students of any race. Moreover, after review of the parties' briefs and the record facts, the Eleventh Circuit explicitly held that "[s]chool officials presented evidence of racial tensions existing at the school and provided testimony regarding fights which appeared to be racially based in the months leading up to the actions underlying this case."

In sum, the students' Petition misrepresents the holding of the Eleventh Circuit in an effort to create a conflict appropriate for resolution by this Court. However, the decisions in *Castorina* and in this matter were based on analysis of the unique factual record established in each of those cases. In *Castorina*, the record failed to demonstrate that a motion for summary judgment in favor of the Madison County School Board was appropriate. In this case, the record affirmatively demonstrated that no genuine issue of material fact or law existed and that the School Board was entitled to a final summary judgment as a matter of law. The Eleventh Circuit's opinion in this case does not conflict with the Sixth Circuit's decision in *Castorina*.

In addition, in their Petition, the students cite cases from other circuits, without analysis, which they contend are in conflict with the Eleventh Circuit's decision in this matter. (Petition, pg 7). This contention is similarly without merit.

Several of the cases cited by the students support the Eleventh Circuit's conclusion that a history of racial tension may support a prohibition on the display of certain symbols. In *Augustus v. School Bd. of Escambia County*, 507 F.2d 152 (5th Cir. 1975), the court noted that where the record before the court demonstrated a history of substantial racial disturbances, a school board regulation banning all use of racially irritating symbols in a high school under a desegregation order may have been permissible under *Tinker*. In *Smith v. St. Tammany Parish School Bd.*, 448 F.2d 414 (5th Cir. 1971), the court held that a district court's order banning symbols or indicia expressing the school board's or its employees' desire to maintain segregated schools and requiring that they "shall be removed from the schools and shall not be officially displayed" was fully warranted under

the facts of the case, but made no comment as to the portion of the order allowing students to wear such symbols. Likewise, the court in *Sypniewski v. Warren Hills Regional Bd. of Educ.*, 307 F.3d 243, 254-62 (3d Cir. 2002), held that the history of racial difficulties in the school district provided a substantial basis for legitimately fearing future disruption from the kind of speech prohibited by the district-wide policy and noting that the "comprehensive authority of . . . school officials . . . to prescribe and control conduct in the schools" "would likely support a ban of displays of the Confederate flag under *Tinker*." Notably, each of these cases dealt with district-wide bans. In this case, the prohibition was implemented by the administration of a single school within Alachua County based on the history of racial tension at that particular school and, thus, was even more narrowly tailored.

Moreover, the students' cited cases clearly demonstrate that other circuit courts have concluded that *Tinker* does not require school authorities to be absolutely certain that a disruption will occur, nor does it require that an actual disruption occur before they may act. To illustrate, in *West v. Derby Unified School District*, 206 F.3d 1358, 1366 (10th Cir. 2000), the Tenth Circuit held that based upon the history of racial tension, school officials had reason to believe that a student's display of the Confederate flag, when unconnected with any legitimate educational purpose, might cause disruption and interfere with the rights of other students to be secure and let alone. Instead, school authorities need only demonstrate facts which *might reasonably lead them to forecast* substantial disruption of or material interference with school activities. *Tinker* at 514. (emphasis added). Thus, the student's suspension was a valid exercise of the school board's constitutional authority under *Tinker*. *West* at 1366;

see also Melton v. Young, 465 F.2d 1332 (6th Cir. 1972), *cert. denied*, 411 U.S. 951 (1973) (holding that a student's suspension for refusal to stop wearing a Confederate flag patch did not violate his rights where substantial racial disorder had occurred in the past at the school and school officials had every right to anticipate that a tense racial situation continued to exist); *Phillips v. Anderson County School Dist. Five*, 987 F. Supp. 488, 492 (D.S.C. 1997) (holding that school authorities are not required to wait until disorder occurs if the facts reasonably support a forecast of likely disruption and noting that it has been held that the school authorities actually have a duty to *prevent* the occurrence of disturbances) (emphasis in original) (multiple citations omitted).

In short, the Eleventh Circuit's decision in this matter does not conflict with precedent in other circuit courts. As in *Augustus*, *Smith*, *Sypniewski*, *West*, *Melton*, and *Phillips*, the history of racial tension at the school made reasonable the administrators' concerns about future substantial disruptions from the display of Confederate flag symbols at school. The administration's actions were not based on a mere desire to avoid discomfort and unpleasantness, but rather upon their well-founded belief that the display of Confederate battle flags would interfere with the school's educational environment. Thus, under a *Tinker* analysis, the actions of the school administration were appropriate.

III. COMPELLING REASONS DO NOT EXIST FOR GRANTING REVIEW IN THIS MATTER.

Pursuant to Rule 10, Rules of Supreme Court of the United States, a petition for a writ of certiorari is rarely granted when the asserted error is based on allegedly erroneous factual findings or the misapplication of a properly stated rule of law. Therefore, the students mischaracterize the holding of the Eleventh Circuit in an effort to "muddy the waters" when, in fact, the court properly applied clear legal principles to the facts of this case.

The students assert that granting review in this matter will "guide the lower courts as well as public school administrators throughout the country in knowing whether non-disruptive symbolic expression by students can be lawfully prohibited under *Tinker* only with substantiated and concrete evidence of disruption or whether such speech can be banned under *Fraser* without any demonstrated evidence of disruption." (Petition, pg 13). Therefore, in effect, the students seek an advisory opinion from this Court of what the law would be under a hypothetical state of facts. The Court has emphasized on numerous occasions that it is without constitutional authority to give advisory opinions and its practice is not to decide abstract, hypothetical, or contingent questions. *See, e.g.*, *Preiser v. Newkirk*, 95 S. Ct. 2330 (1975) (holding that judgments of federal courts must resolve a real and substantial controversy providing specific relief through a decree of conclusive character as distinguished from an opinion advising what law would be upon a hypothetical state of facts) (citation omitted); *Golden v. Zwickler*, 89 S. Ct. 956 (1969) (holding that federal courts do not render advisory opinions; for adjudication of constitutional issues, concrete legal issues, presented in actual

cases, not abstractions, are requisite). Since the Eleventh Circuit properly held that the actions of the administration were based on reasonable concerns that the display of the flags would lead to substantial disruption or material interference with school activities, if the Court were to address the question presented by the students, it would be required to declare principles or rules of law which could not affect the outcome or affect the rights of parties in this matter.

As set forth above, *Tinker* does not require school authorities to be absolutely certain that a disruption will occur, nor does it require that an actual disruption occur before they may act. *See, e.g., West v. Derby Unified School District* at 1366 (discussed *infra).* Instead, school authorities need only demonstrate facts which *might reasonably lead them to forecast* substantial disruption of or material interference with school activities. *Tinker* at 514. (emphasis added).

Over the last thirty-four years, expanding upon the foundation set forth in *Tinker*, this Court has emphasized the power of school officials to prevent disturbances to the educational environment on school campuses. *See generally Bethel School District v. Fraser*, 478 U.S. 675 (1986) (holding that the defendant school district acted appropriately in disciplining a student who gave a lewd, but not legally obscene, speech at a school assembly); *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260, 266 (1988) (applying a permissive "legitimate pedagogical concern" test in a case involving student's school-sponsored speech). Neither *Fraser* nor *Hazelwood* expressly overrule *Tinker*, rather they merely refine the general principles established in *Tinker* and further define the limited scope of a students' constitutional rights in light of the special characteristics of a public school setting.

In this matter, the Eleventh Circuit did not apply *Fraser* to the exclusion of *Tinker* nor did it question the validity of *Tinker*. The Eleventh Circuit did not hold that the prohibition in this case was constitutional under facts that failed to provide substantiated and concrete evidence of disruption. The court did not hold "a ban is justified by an evidence of racial conflict, no matter how remote in time and unrelated to the symbolic display of the Confederated [sic] Battle flag in question." (Petition, pg 13).

To the contrary, the Eleventh Circuit held that the School Board presented evidence of racial tensions existing at the Santa Fe High School and explicitly acknowledged the reasonableness of the concern that the administration had "regarding the disruption, hurt feelings, emotional trauma and outright violence which the display of the symbols involved in this case could provoke." *Scott* at 1249. The court properly applied a *Tinker* analysis in this case when it concluded the administration at Santa Fe High School reasonably restricted the students' speech.

Thus, the students' asserted rationale for review is without basis. Since this case raises no issue that warrants this Court's review, the students' petition should be denied.

CONCLUSION

For the foregoing reasons, the School Board of Alachua County respectfully requests that this Court deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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